Supreme Court, U.S.
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No. 91-786

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ERNEST L. CLARKE,

Petitioner,

v.

LOMA LINDA FOODS, INC., LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, and JAMES SMEENGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION

EVERETT L. SPRIGGS
Attorney of Record
PAUL B. REYNOLDS
KINKLE, RODIGER AND SPRIGGS
3801 University Avenue, Suite 7000
Riverside, California 92501
(714)683-2410

ATTORNEYS FOR RESPONDENTS
LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH, JAMES SMEENCE
(LOMA LINDA EMPLOYEES)

QUESTIONS PRESENTED

1. May a plaintiff-employee who has failed to allege: (1) the existence of an internal administrative procedure to address a grievance with his employer under his employment contract; (2) any attempt on his part to comply with such a procedure; or (3) any interference by the defendant-employer with such an attempt raise, for the first time on petition for certiorari to this Court, a claim that there has been an impairment of his right to enforce his employment contract under 42 U.S.C. Section 1981?

2. Does the language of 42 U.S.C. Section 1981, "make and enforce contracts," extend to prospective agreements a sales employee may enter with customers on behalf of his employer?

3. May one who voluntarily abandons his employment duties maintain an action pursuant to 42 U.S.C. Section 1981 against his employer for racially motivated discharge?

4. Does plaintiff's complaint in the Federal District Court of California, Central District, state a cause of action upon which relief can be granted under 42 U.S.C. Section 1981 given the one-year statute of limitations set forth in California Code of Civil Procedure, section 340, subdivision (3)?

5. Are factual allegations of incorrect lower court rulings, without any argument or authority to support those allegations, sufficient to obtain review of this Court through a Petition for Writ of Certiorari?

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Respondents, LARRY BOGGESS, TED O. COOK, NABIL RAZZOUK, ADAM SCHLERETH and JAMES SMEENGE ("LOMA LINDA EMPLOYEES") hereby submit their Brief in Opposition to the Petition for Writ of Certiorari filed by ERNEST L. CLARKE seeking review of the Ninth Circuit Court Appeals decision rendered in this matter May 28, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals, was in the form of a Memorandum Decision, not approved for publication. It is reported as Table Case at 933 F.2d 1013, 1991 U.S. App. LEXIS 22733. The full text appears in the petitioner's appendix, and the opinion of the District Court appears in the appendix of respondent's, LOMA LINDA FOODS, INC., Brief in Opposition to Petition.

JURISDICTION

LOMA LINDA EMPLOYEES take no issue with the statement of jurisdiction set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES

Respondents, LOMA LINDA EMPLOYEES, join in Respondent's, LOMA LINDA FOODS, INC., Statement of Constitutional Provisions and Statutes, and hereby incorporate that Statement in its entirety by reference.

INTRODUCTION

LOMA LINDA EMPLOYEES join Respondent, LOMA LINDA FOODS, INC., in arguing that the Petition fails to meet the criteria necessary for review by petition for writ of certiorari as set forth in the rules of this Court and decisional law and is therefore without merit. Careful

analysis of the Petition for Certiorari reveals no claim that the Ninth Circuit opinion conflicts with decisions of this Court or creates a conflict in decisions between circuits, or presents an issue of federal law not previously settled by this Court. Therefore, CLARKE's Petition for Certiorari should be denied.

STATEMENT OF THE CASE

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the Statement of the Case as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

STATEMENT OF FACTS

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the Statement of Facts as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS FAILED TO ESTABLISH A SPECIAL OR IMPORTANT REASON AS REQUIRED BY THE RULES OF THIS COURT FOR ISSUANCE OF A WRIT OF CERTIORARI

The factors this Court considers when evaluating a petition for writ of certiorari include whether a Circuit Court of Appeals of the United States has: rendered a decision in conflict with a decision of another Circuit Court on the same matter (Sup.Ct.R.10.1(a)); decided an important questions of federal law which has not been, but should be, settled by this Court (Sup.Ct.R.10.1(c)); or decided a federal question in a way that conflicts with applicable decisions of this Court (Sup.Ct.R.10.1(c)). None of these factors are present in this case.

As his first reason for granting the Writ, CLARKE states that "the Court below

failed to give due emphasis to the fact that the primary focus of the Patterson case is the "contract" aspect of 42 U.S.C. Section 1981..." (Pet., p.5) However, CLARKE fails to identify any Circuit Court cases which are in conflict with the Ninth Circuit's application of Patterson v. McClean Credit Union, 491 U.S. at 180, and does not reveal any way in which the Ninth Circuit opinion conflicts with this Court's decision in Patterson, or with any other opinion of this Court. CLARKE's true focus is that Patterson was wrongly decided, which he unsuccessfully argued to the Ninth Circuit. The Court of Appeals correctly held that Patterson was binding authority which that Court had no authority to overturn. (App.15, n.2) Upon review, it is clear the Ninth Circuit properly applied Patterson to the facts of this case.

Petitioner's second stated reason for grant argues that when read together, the Ninth Circuit opinion and Patterson act to grant immunity to employers when they impair the right of an employee to make sales contracts. (Pet., p.9) No such immunity applies in this case. 42 U.S.C. Section 1981 was the sole basis for all claims pled by CLARKE in his complaint. Patterson clearly states that employment discrimination claims of this type are appropriately asserted under Title VII the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., rather than under the more limited Section 1981. Patterson v. McLean Credit Union, 491 U.S. at 180. Consequently, the Ninth Circuit opinion in no way prevents other potential claims for relief under state or federal law. Rather than supporting any reason to grant CLARKE's Petition, this indicates the

Ninth Circuit opinion is in line with the holdings of this Court and other Circuit Courts.

CLARKE's final reason for grant is based entirely on contentions of fact. As this Court will not review mere conflicts in the evidence, National Labor Relations Board v. Pittsburgh S.S. Co., 240 U.S. at 503, this is an improper basis for this Court to review the decision of the Ninth Circuit. In addition, while CLARKE asserts four District Court rulings were incorrect, he fails to cite a single authority or offer a solitary argument explaining why any one of them was incorrectly decided.

II.

CLARKE'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AS IT CONTAINS NO ALLEGATIONS LOMA LINDA INTERFERED WITH HIS RIGHT TO USE LEGAL PROCESS IN AN EFFORT TO ENFORCE HIS EMPLOYMENT CONTRACT

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion regarding Petitioner's failure to state a claim as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC. In addition, LOMA LINDA EMPLOYEES assert that the Civil Rights Act of 1991 (Pub.L.102-166) does not act to overrule the application of Patterson to this case. Patterson clearly held that the right to enforce a contract protected by 42 U.S.C. Section 1981 is the right to use legal process to enforce that contract. The Civil Rights Act of 1991 merely codifies the definition of the term 'make and enforce contracts' already

contained in 42 U.S.C. Section 1981. It does not alter or expand the rights of enforcement set forth in Patterson. For the reason stated in Respondent's, LOMA LINDA FOODS, INC., Brief in Opposition to Petition, CLARKE has failed to state a claim upon which relief may be granted.

III.

42 U.S.C. SECTION 1981 DOES NOT INCLUDE THE RIGHT OF AN EMPLOYEE TO MAKE SALES CONTRACTS WITH CUSTOMERS OF HIS EMPLOYER

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion on the applicability of 42 U.S.C. Section 1981 regarding the rights of an employee to make sales contracts with customers of an employer as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

IV.

CLARKE'S COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT A CLAIM OF RACIALLY MOTIVATED DISCHARGE

In his complaint, CLARKE acknowledged he voluntarily chose not to report on June 3, 1985, to his newly assigned sales territory. Therefore, CLARKE was never discharged, but resigned of his own volition.

CLARKE's Brief on Appeal to the Ninth Circuit revealed the true basis of his claim of racially motivated discharge, that "conduct on the part of defendants made it impractical for him to continue." ("Brief of Appellant," p.17.)

As it is clear no actual direct discharge occurred in this case, petitioner's claim must meet the requirements for constructive discharge. A constructive discharge must be based on objective criteria which create

intolerable conditions a reasonable person could not expected to bear. Yeats v. Avco Corp., 819 F.2d. 630, 636-637 (CA6 1987); Darnell v. Campbell County Fiscal Court, 731 F.Supp. 1309, 1312-13 (E.D.Ky. 1990). Therefore, CLARKE's pleadings fail to rise to the level required to state a claim for constructive discharge.

V.

CLARKE'S CLAIMS BASED UPON 42 U.S.C. SECTION 1981 ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

LOMA LINDA EMPLOYEES hereby incorporates in its entirety the discussion on the applicability of the Statute of Limitations as put forth in the Brief in Opposition to Petition filed by LOMA LINDA FOODS, INC.

VI.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

EVERETT L. SPRIGGS
Attorney of Record
PAUL B. REYNOLDS
KINKLE, RODIGER AND SPRIGGS
3801 University Avenue, Suite 7000
Riverside, California 92501
(714)683-2410

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